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Supreme Court, U.S.
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No. 08-87

In the Supreme Court of the United States

REINSURANCE RESULTS, INC.,

Petitioner,

vs.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the decision below ignore the principle articulated by this Court that on a motion for summary judgment all inferences must be viewed in the light most favorable to the party opposing the motion?

Material facts existing include:

a) Appellant RRI identified a processing error with its report of January 7, 2005;

b) Appellee ILM's immediate request and receipt of $2.2 million dollars was clearly a benefit to ILM;

c) There was no change to the Statement of Statutory Accounting Principles, No. 62, justifying ILM's initial adoption of the accounting protocol in question;

d) ILM's accounting protocol clearly affected its processing of claims for years 1999 - 2001 with ILM's Aggregate reinsurer.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The following persons are listed pursuant to Rules 14.1 (b) and 29.6 of the Rules of this Court to disclose the parties, corporate parents, and subsidiaries:

1. Indiana Lumbermens Mutual Insurance Company (hereinafter "ILM"), Appellee

2. Reinsurance Results, Inc. (hereinafter "RRI"), Appellant

ILM is a mutual insurance company organized under the laws of the State of Indiana. ILM's principal office is in Indianapolis, Indiana.

RRI is a corporation organized under the laws of the State of Minnesota. RRI's principal place of business is in Eden Prairie, Minnesota. No corporation owns 10% or more of the common stock of RRI.

PETITION FOR A WRIT OF CERTIORARI

Reinsurance Results, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

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OPINIONS BELOW

The opinion of the Court of Appeals is published at 513 F.3rd 652 (7th Cir., 2008). The Court of Appeals decision is printed in the attached Appendix (App. 1).

The opinion of the District Court dated October 27, 2006, granting the motion for summary judgment of Indiana and dismissing all other claims is printed in the Appendix (App. 14).

JURISDICTION

The decision of the Court of Appeals was entered January 16, 2008. The jurisdiction of this Court is based on 28 U.S.C. § 1332 and § 1291.

RULE INVOLVED

Rule 56 (b), (c), and (e), Federal Rules of Civil Procedure.

(b) FOR DEFENDING PARTY. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) SERVING THE MOTION; PROCEEDINGS. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law.

(e) AFFIDAVITS; FURTHER TESTIMONY.

STATEMENT OF THE CASE

Background:

ILM engaged the expertise of Mr. Thomas Thompson, sole owner of RRI, to review its reinsurance premium and claim processing with the hope he would find "net funds" due ILM from its reinsurers.

Nov. 29, 2004 Contract:

The one (1) page paragraph contract between ILM and RRI included the following three (3) provisions:

1. RRI would review ILM's "historical reinsurance premiums and claims cessions"; and
2. RRI would provide a report, "detailing any premium and/or claims identified during the course of the review that have not been processed in accordance with reinsurance contract terms and conditions"; and
3. ILM would pay a contingency fee equal to thirty-three percent (33%) of the "net funds" collected from ILM's reinsurers as a result of the review.

Mr. Thompson performed his review and reported ILM was due an amount in excess of Two million two hundred thousand dollars ($2,200,000.00) from its Aggregate reinsurer. The report was dated

January 7, 2005.

With a letter dated February 17, 2005 and two (2) subsequent requests, ILM requested and immediately received from its Aggregate reinsurer the "net funds" identified in Mr. Thompson's report of January 7, 2005.

ILM refused to pay RRI the contingency fee, claiming RRI went beyond the scope of the engagement to identify these funds and the engagement was of no overall benefit to ILM.

As the court may be aware, the reinsurance industry is a financially sophisticated business. At its core, however, it is simply the mechanism by which an insurance company shares policy exposures with other insurance companies, for a price.

The Aggregate Excess of Loss Reinsurance contract relevant to this case is commonly referred to as a "stop loss" contract. When all other reinsurance coverages (i.e. those that apply before the stop loss) are exhausted, a "stop loss" reinsurance contract guarantees an insurance company will not have to pay any loss after its net losses exceed a pre-agreed percentage of its net premiums. For ILM this percentage was 72.5%. The Aggregate reinsurer pays 100% of all loss in excess of 72.5% of the insurance company's net premiums. This "net loss ratio" uses the losses incurred by the insurance company (less losses paid by the other reinsurers) as the numerator and the premiums received by the insurance company (less premiums paid to other reinsurers) as the denominator in the equation.

For the years 1999, 2000, and 2001, ILM incorrectly reported to its Aggregate reinsurer its premiums (the denominator portion of the above

identified net loss ratio). ILM did not fully identify the total amount of the premiums it paid to other reinsurers and therefore artificially inflated the denominator portion of the net loss ratio. By artificially inflating the denominator component of the "net loss ratio" the Aggregate reinsurer was not being asked to pay 100% of ILM's losses as it was contractually obligated to do so. This resulted in ILM's Two million two hundred thousand dollar ($2,200,000.00) claim to the Aggregate reinsurer.

In 2000, ILM created a false "reserve" on its balance sheet by under-reporting the amount of premiums it paid to its other reinsurers. This scheme was contrary to the Statement of Statutory Accounting Principles No. 62, paragraph 25. Following the RRI report of January 7, 2005, ILM's accountant's national accounting office confirmed the false reserve was contrary to accepted accounting principles. ILM changed its internal accounting protocol to reflect the correct and complete amount of premiums it paid to the other reinsurers. ILM then promptly reprocessed its claims to its Aggregate reinsurers and collected the 2.2 million "net funds."

ILM refused to pay the contingency fee and started a Declaratory Action in the Southern District of Indiana claiming Diversity of Jurisdiction. Both parties moved for Summary Judgment.

District Court Decision

Judge Larry J. McKinney, Chief Judge, United States District Court for the Southern District of Indiana, granted ILM's motion and denied RRI's motion by Order dated October 27, 2006.

The Judge found no genuine issue as to a

material fact. The Court stated the unambiguous contract did not contemplate RRI's review of ILM's accounting methods, specifically ILM's deferral of reinsurance premiums. (App. 25) Claiming plain and ordinary meaning, the Court concluded the use of the word "historical" when referring to RRI's obligation to review ILM's premiums and claims cessions, "does not reflect changes made to a party's accounting methods." (App. 23)

The Court effectively found ILM's subjective intent, should be added to the contract. ILM's subjective intent was a refusal to pay the contingency fee should the collection of the net funds be caused by an improper accounting protocol.

RRI brought an appeal to the Seventh Circuit Court of Appeals, asking the Court to reverse the decision to deny its request for Summary Judgment and to reverse the Court's granting of ILM's motion for Summary Judgment.

Seventh Circuit Court of Appeals:

Judge Posner, writing for the majority, affirmed the District Court in a decision dated January 16, 2008.

The Court of Appeals apparently concluded no genuine issue of material fact existed. Without presenting its analysis whereby the Court assumes facts in favor of the non-moving party (RRI), the Court made the following determinations of fact:

1. ILM properly processed its claims with its Aggregate reinsurer prior to RRI's report of January 7, 2005. (App. 7)
2. Despite the acknowledged receipt of $2.2 million dollars from its Aggregate reinsurer, ILM received no "benefit" from

the November 29, 2004 contract. (App. 8, 11-12)

3. A change had occurred with Statement of Accounting Procedure 62 which led ILM's National Accounting Office to recommend a reversal of ILM's internal accounting principles. (App. 5)

4. The change of accounting standards was a decision internal to [ILM]; it had nothing to do with the terms of the reinsurance contracts. (App. 8)

These four (4) findings, and others, were challenged by RRI within its brief and supporting documents and oral arguments. All four present genuine issues of material fact preventing Summary Judgment for ILM.

1. Processing of Claims.

The underlying Aggregate Reinsurance contract was a financial ratio contract. In order for it to be processed correctly, ILM had to report its net losses and net income correctly. ILM failed to do that. It over-reported its net income by failing to account for all premiums paid to other reinsurers.

RRI, after reviewing the raw data provided it by ILM, concluded ILM failed to accurately report its net income. The cause of that processing error related back to ILM's decision to create a false reserve contrary to standard accounting principles.

Could a jury determine, as Judge Posner did, no processing error occurred because the underlying error was an accounting decision? Possibly. But it is also probable a jury could easily find ILM's failure to properly account to its Aggregate reinsurer its true net

premiums was a processing error. ILM admits it "reprocessed" its claims within forty-five (45) days of receiving RRI's report identifying the exact same net funds. Further proof of the processing error is the fact the Aggregate reinsurer paid the net funds without a fight or even a second request. The processing error was obvious.

2. "No Benefit" to ILM:

To conclude ILM received no benefit from the performance of the contract Judge Posner also had to insert into the one (1) page contract ILM's subjective intent to continue to present a misleading accounting statement despite such accounting principles being contrary to Statutory regulations and the public good. This subjective intent may be real to ILM but it was never made a part of the contract or communicated to RRI prior to executing the contract.

The benefit bargained for and which triggered the payment of a contingency fee to RRI was the receipt of "net funds" from ILM's Aggregate reinsurer. ILM acknowledged the receipt of the $2.2 million dollars. It may be possible to argue the receipt of that money, as contemplated in the Nov. 29, 2004 contract, did not come to ILM because of RRI's efforts. But there is no doubt that question remains a genuine issue of a material fact. RRI is entitled to have a jury make that decision.

3. Accounting Standard 62:

ILM argued that there was a change to Statement of Statutory Accounting Principles No. 62; RRI declared there was in fact no such change. ILM failed to present any evidence whatsoever to support

their claim of a change.

This is relevant to the case as ILM proffered this inaccurate "fact" to suggest a plausible excuse for why ILM made the original accounting protocol change.

4. Accounting Change:

Judge Posner accepted ILM's argument that there was no "processing error" relative to the Aggregate Reinsurance contract. He concluded the error was a "decision internal to the insurance company; it had nothing to do with the terms of the reinsurance contracts" (App. 8). By doing this, Judge Posner ignores the very nature of the Aggregate Reinsurance contract.

As stated earlier, the Aggregate contract is a financial ratio contract. Overstating its net income (by under-reporting its premiums paid to other reinsurers), ILM affected how much loss the Aggregate reinsurer paid under the contract.

The fact the processing error can be traced back to a voluntary accounting choice does not magically render the processing error to be something else.

In addition, by ultimately challenging ILM's accounting protocol, RRI bestowed a benefit on ILM for which RRI sought no additional compensation. ILM has avoided claims of fraud by regulators, ratings agencies, and policyholders.

REASONS FOR GRANTING THE WRIT

RRI is appealing to the judicial discretion of the U.S. Supreme Court because the 7th Circuit Court of Appeals has affirmed a district court's decision, by departing from the accepted and usual course of judicial

proceedings by ignoring established case law regarding a Rule 56 motion for summary judgment.

A. THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED ENTRY OF RULE 56 SUMMARY JUDGMENT

On a motion for summary judgment, the non-movant's evidence is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. Eastman Kodak Co. v. Image Technical Services, Inc., et al., 504 U.S. 451, 456, 112 S.Ct. 2072, 2076B77, 119 L.Ed.2d 265, 277 (1992). Summary judgment should not be granted unless it is clear that a trial is unnecessary. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986), and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158B59, 90 S.Ct. 1598, 1608B09, 26 L.Ed.2d 142 (1970). Further, "if there is any evidence in the record from any source from which a reasonably inference may be drawn, the moving party simply cannot obtain a summary judgment . . . ." Celotex Corp., v. Catrett, 477 U.S. 317, 330, 106 S.Ct. 2548, 2556 (1986) (citing In re Japanese Electronic Products, 723 F.2d 238, 258 (3rd Cir. 1983)). Finally, summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free of doubt. Traveler's Ins. Co. v. Eljer Mfg., Inc., 197 Ill.2d 278, 292, 757 N.E.2d 481, 491, 258 Ill.Dec. 792, 802 (2001).

This Court should review and reverse the decision of the Seventh Circuit Court of Appeals in the exercise of this Court's power of supervision over the

lower federal courts to apply the principles consistently articulated by this Court for interpreting and applying Rule 56 of the Federal Rules of Civil Procedure governing summary judgment. Both the District Court and the Court of Appeals failed to view the inferences to be drawn from the underlying facts most favorable to RRI, the party opposing the motion for summary judgment. This Court has unwaveringly prescribed the basic rule on summary judgment, that is, that "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."

Conclusion:

For the foregoing reasons, Petitioner requests the Court to grant this petition and vacate the decision below, so that legal counsel may take Petitioner's case to trial.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-1823

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v.

REINSURANCE RESULTS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 05-CV-683—**Larry J. McKinney,** *Judge.*

ARGUED DECEMBER 7, 2007—DECIDED JANUARY 16, 2008

Before POSNER, ROVNER, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge.* The defendant in this diversity suit for breach of contract governed by Indiana law appeals from the grant of summary judgment in favor of the plaintiff. The case turns on the interpretation of a contract between an insurance company, Lumbermens Mutual, the plaintiff, and Reinsurance Results, the defendant, which reviews an insurance company's claims against its reinsurers to make sure the insurance company receives the benefits to which its reinsurance contracts entitle it. We'll sometimes call Lumbermens the "insurance

company" and we'll call Reinsurance Results the "service company."

The contract is very short and its key language shorter still. The service company undertakes to review the insurance company's claims and to report any "premium and/or claims identified during the course of the review that have not been processed in accordance with the reinsurance contract terms and conditions." The fee for this service is 33 percent of the "'Net Funds' collected from [the insurance company's] reinsurers as a result of this review." The service company claims that it obtained net funds of $2.2 million for its client and thus is owed 33 percent of that amount. The insurance company, disagreeing, brought this declaratory judgment action, contending that it owes the service company nothing, and won.

Reinsurance is a dauntingly complex, esoteric field of business and the briefs in this case are correspondingly complex and esoteric. But the facts relevant to the appeal are actually rather simple, and the forbidding jargon of reinsurance ("ceded unearned premium," "aggregate excess of loss," "under-ceded reinsurance loss," "reinsurance treaty," and the rest) can be dispensed with. An insurance company—which is to the reinsurer as an insured is to the insurance company—pays premiums for reinsurance. Until 2000, Lumbermens expensed the entire premium cost of its reinsurance policies in the calendar year in which it bought them. That year, with the approval of its auditor, PricewaterhouseCoopers (PwC), it changed its accounting method as follows. It divided the premium by the number of years of coverage that it had brought, and treated each year's share of the premium as an expense in that year. It then

reclassified the premium—which it had already paid, for coverage over the life of the policy—as a prepayment of future expenses and thus as a capital asset (like a reserve for a tenant who pays a year's worth of rent in advance) to be amortized over its useful life (the period of coverage). By thus increasing the assets reflected on its books of account, Lumbermens increased the amount of surplus shown on the books.

The accounting change affected the amount that Lumbermens could bill its reinsurers for losses covered by its reinsurance policies. This will take some explaining. There are tiers of reinsurance coverage, just as there are tiers of insurance coverage. Assume, to keep things simple, that there are only two reinsurance tiers, with the first covering losses up to some specified amount and the second losses above that limit. (That is the equivalent of primary and secondary coverage in an ordinary insurance contract.) If a loss above the first reinsurer's limit occurs, the insured (that is, the insurance company, Lumbermens in our case) bills it for the loss. But the net recovery by the insurance company is the reimbursement for the loss minus the premium it paid for the coverage. The loss above the first reinsurer's loss limit is reimbursed by the second reinsurer, but—and this is the key to understanding this case—the premium that the second reinsurer charges is based on the net reimbursement to the insurance company by the first reinsurer and thus on the loss up to the first reinsurer's loss limit minus the premium paid to that reinsurer. So if, for example, the loss to be reinsured against is $20 million, the loss limit of the first reinsurer $10 million, and the premium paid to the first reinsurer $1 million (10

percent of the policy limit), the second reinsurer, which makes good the difference between the $20 million loss and the $10 million paid by the first reinsurer, will base its premium (which let's suppose is also 10 percent) on the difference between the first reinsurer's loss limit and that reinsurer's premium. That difference in our example is $9 million ($10 million – $1 million), and so the second reinsurer's premium is $900,000 rather than $1 million; if instead the second reinsurer charged the insurance company $1 million, the company would therefore be entitled to a refund of $100,000.

But when in 2000 Lumbermens changed its accounting method, no longer, when it submitted a claim to the second reinsurer, would it deduct the premium to the first insurer, though it had paid it, because on its books it had deferred that premium expense, and its contracts with the reinsurers based premiums on book values rather than cash flow. The amounts deferred must have exceeded the higher premiums paid the second-tier reinsurers, so that the accounting change increased the company's surplus; otherwise the company would not have made the change. But why would an insurance company trade higher book value (another term for surplus) for a lower cash flow? The answer appears to be that the number of policies an insurer is permitted by its regulators to write, and therefore the amount of premiums that it can collect, is proportional to its surplus. So Lumbermens may have traded higher premium revenue for lower reimbursements from its reinsurers without abandoning its business common sense. And the fact that an insurance company's ability to write policies is tethered to the surplus shown on its books may explain why reinsurers base

their premiums on the company's accounting classifications. The more policies an insurer writes, the more likely it is that one of its policy holders will incur a loss that triggers the reinsurer's liability to the insurance company. To compensate for this elevated risk, the prudent reinsurer demands a higher premium, which takes the form of a delayed reimbursement to the insurer. The insurer gets to write additional policies, and during the interval when the insurer's surplus is inflated by its method of accounting, the reinsurer enjoys the time value of money reimbursed at a later date.

Lumbermens' contract with the service company went into effect in November of 2004. A few days later the company sent Lumbermens a memo noting the 2000 accounting change and suggesting that it was improper. The insurance company checked with PwC, which advised the insurance company, on the basis of a change that had been made in the National Association of Insurance Commissioners' Statement of Statutory Accounting Procedure 62, to revert to its pre-2000 accounting practice. It did so, and this required it to reduce the net surplus carried on its books by $829,000. It billed the second- (and higher-) tier reinsurance companies for the premium overpayments that it had incurred by virtue of not deducting the lower-tier reinsurers' premiums when it had paid them. The reinsurance companies paid what the insurance company said they owed it and that is the $2.2 million of which the service company claims to be owed a third.

The insurance company argues that the receipt of the $2.2 million from the reinsurers was not a benefit to the company. It *wanted* to defer the receipt of that money from its reinsurers in order to augment its

surplus because it thought the profits derived from the additional policies that it would be able to write as a result of having a higher surplus would exceed the premium overpayments. If this is right, the service company did Lumbermens no favor by causing it to return to the old method.

The argument is not necessarily wrong, though it is speculative. The insurance company's accounting method was questionable (or so at least PwC advised it), and continued adherence to it might have gotten it into trouble with the insurance regulators. They do not like insurance companies to use questionable accounting methods to jack up their surpluses, since overstating the company's assets and thus the amount of insurance that it may write increases the risk of default. Sooner or later, then, the company would probably have had to go back to its old method of accounting for reinsurance premiums. And by then, the service company argues, it might have been too late for the insurance company to be able to collect the money (the excess premiums) owed it by the upper-tier reinsurers. This, however, is unlikely. The insurance company would not have wanted to defer receipt of the money owed it by its reinsurers to a point at which the money might become uncollectible. And it did not; rather than deferring receipt indefinitely, as the service company's argument implies, it deferred it just till the reinsurance policy expired, at which point its prepayment asset would have been fully depreciated.

The service company's better argument is that by causing the insurance company to check with PwC and as a result revert to its old accounting practice, it saved the insurance company from a possible tiff with its regulators—though the service company's lawyer

acknowledged at argument that the regulators might not have noticed the accounting irregularity, or if it did notice them, care.

We defer for the moment further discussion of the benefit, if any, conferred on the insurance company by the service company to consider whether, if a benefit was conferred, the conferral was pursuant to the contract. It was not. The contract, drafted by the service company's chief executive officer, is specific and clear; and were it unclear, any ambiguity would have to be resolved against the service company because it drafted the contract. Indiana applies this rule of contract interpretation, rightly or, as might be argued, wrongly, *Farmers Automobile Ins. Ass'n v. St. Paul Mercury Ins. Co.*, 482 F.3d 976, 977 (7th Cir. 2007)—but that is none of our business in a case governed by Indiana law—even when the other party to the contract is, as in this case, commercially sophisticated. E.g., *Cinergy Corp. v. Associated Electric & Gas Ins. Services, Ltd.*, 865 N.E.2d 571, 574-77 (Ind. 2007); *Trustcorp Mortgage Co. v. Metro Mortgage Co.*, 867 N.E.2d 203, 213-16 (Ind. App. 2007); *Liberty Ins. Corp. v. Ferguson Steel Co.*, 812 N.E.2d 228, 230 (Ind. App. 2004).

The contract states that the service company is to report any loss or premium-overpayment claims, discovered during the course of its review of the insurance company's reinsurance contracts, "that have not been processed *in accordance with the reinsurance contract terms and conditions*" (emphasis added). The claims that the insurance company submitted to its reinsurers were correctly processed. Nothing in the terms of its reinsurance contracts requires it to use one method of accounting rather than another. The decision first to defer reporting to

the upper-tier reinsurers the premiums paid to the lower-tier reinsurers and then, four years later, to bill them for the premiums it had overpaid, because PwC told it that deferring the reporting of the premiums was a violation of accounting standards, was a decision internal to the insurance company; it had nothing to do with the terms of the reinsurance contracts. Had the service company discovered that a term of one of those contracts entitled the insurance company to coverage for a loss that it had experienced but for which it had not submitted a claim, then the service company would be entitled to 33 percent of the amount of the claim when the insurance company billed and received it. But that is not what happened. The service company's discovery of the 2000 accounting maneuver and its recommendation that the insurance company abandon it *may* have benefited the company. But it was not a benefit for which the insurance company was contractually obligated to compensate the service company.

One who voluntarily confers a benefit on another, which is to say in the absence of a contractual obligation to do so, ordinarily has no legal claim to be compensated. E.g., *In re Grabill Corp.*, 983 F.2d 773, 776 (7th Cir. 1993); American Law Institute, *Restatement (First) of Restitution* § 2 (1937). If while you are sitting on your porch sipping Margaritas a trio of itinerant musicians serenades you with mandolin, lute, and hautboy, you have no obligation, in the absence of a contract, to pay them for their performance no matter how much you enjoyed it; and likewise if they were gardeners whom you had hired and on a break from their gardening they took up their musical instruments to serenade you. When

voluntary transactions are feasible (in economic parlance, when transaction costs are low), it is better and cheaper to require the parties to make their own terms than for a court to try to fix them—better and cheaper that the musicians should negotiate a price with you in advance than for them to go running to court for a judicial determination of the just price for their performance. In contrast, "when a businessman renders a valuable service in circumstances in which compensation would normally be expected, and though he is acting without the knowledge or consent of the recipient of the service there is no alternative because transacting with the owner would be infeasible (maybe the owner can't be located), an award of compensation is appropriate to encourage a valuable activity." *Nadalin v. Automobile Recovery Bureau, Inc.*, 169 F.3d 1084, 1086 (7th Cir. 1999). That is the case of prohibitively high transaction costs. This is not such a case.

Another inapplicable exception to the law's hands-off approach comes into play when the party rendering the service reasonably expects to be paid for it though he has no contractual entitlement. E.g., *Olsson v. Moore,* 590 N.E.2d 160, 163 (Ind. App. 1992). There might be a contract but it might be unenforceable because it violated the statute of frauds, yet thinking it enforceable the performing party had performed his (reasonably, but incorrectly, supposed) obligations under the contract and now seeks compensation. He would not be entitled to the contract price, because the contract was unenforceable, but he would be entitled to the market value of his performance. *Wallace v. Long*, 5 N.E. 666, 668-69 (Ind. 1886); *Mueller v. Karns*, 873 N.E.2d 652, 658-59 (Ind. App. 2007); *Scheiber v. Dolby*

Laboratories, Inc., 293 F.3d 1014, 1022-23 (7th Cir. 2002) (Indiana Law); *ConFold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 957-58 (7th Cir. 2006).

The doctrine that allows this is quantum meruit, a branch of the law of restitution, having roots in equitable notions; and the service company advanced a claim for compensation under it in the district court. The court rejected the quantum meruit claim, and the company has abandoned the claim on appeal—wisely. The service company did not render a service pursuant to an unenforceable contract; it rendered a service outside the contract, as we have seen. When parties have a valid contract, there is no bargaining failure that would justify a court's awarding a party more than he had contracted for. As we noted in *Industrial Dredging & Engineering Corp. v. Southern Indiana Gas & Electric Co.*, 840 F.2d 523, 525 (7th Cir. 1988) (citations omitted), "Indiana appellate courts have uniformly held that 'the existence of a valid express contract for services . . . precludes implication of a contract covering the same subject matter. The rights of the parties are controlled by the contract and under such circumstances recovery cannot be had on the theory of quantum meruit.'" See, e.g., *Milwaukee Guardian Ins., Inc. v. Reichhart*, 479 N.E.2d 1340, 1343-44 (Ind. App. 1985); see also *Goldstick v. ICM Realty*, 788 F.2d 456, 466-67 (7th Cir. 1986).

The result may seem harsh, but we will be able to see the sense behind it by resuming our discussion of whether the service company actually conferred a benefit on the insurance company. We said that it may have done so, but we said nothing about the size of the benefit. It is most unlikely that the $2.2 million that the insurance company received from its

reinsurers as a result of the service company's tip was a net benefit to the insurance company. The company wanted to defer receipt of the money, and would probably have gone on doing just that, for a time anyway, had it not been induced by the service company to seek the advice of its auditor, from whom it learned the bad news. By continuing, the insurance company might have gotten into hot water with its regulators, but perhaps not—so could a court compute the benefit that the tip had conferred?

Nor is benefit conferred the usual measure of market value, which is the value that courts use to calculate the relief due a plaintiff whose claim of quantum meruit succeeds. *In re Carroll's Estate,* 436 N.E.2d 864, 866 (Ind. App. 1982); *ConFold Pacific, Inc. v. Polaris Industries, Inc., supra,* 433 F.3d at 958. In a competitive market, price tends to be driven down to or at least near cost; it is under monopoly conditions that sellers are able to appropriate what economists call "consumer surplus"—the difference between the value of a good or service to a consumer (in the sense of the highest price he could be made to pay for it—his "reservation price") and the market price. If an airline ticket costs $100, but you would be willing, if pushed, to pay up to $300 for it, you derive $200 in consumer surplus from the transaction. Obviously this does not mean that if your travel agent obtains the ticket for you, he will charge you $300. Travel agents nowadays do often charge ticketing fees, but they are modest, reflecting competitive pressures. It is no surprise that when courts award quantum meruit they base the award on the market price of the good or service in question. There is no market price for the extracontractual "service" that the service company rendered the

insurance company.

The service company might have drafted the contract that it submitted to the insurance company more broadly—might have inserted a provision entitling the service company to be compensated for any advice it gave the insurance company that the latter took. But the insurance company might well have balked at such a demand, as vistas of contention over benefits conferred opened up before it. So the service company really is seeking more than it bargained to receive.

A note, finally, on advocacy in this court. The lawyers' oral arguments were excellent. But their briefs, although well written and professionally competent, were difficult for us judges to understand because of the density of the reinsurance jargon in them. There is nothing wrong with a specialized vocabulary—for use by specialists. Federal district and circuit judges, however, with the partial exception of the judges of the court of appeals for the Federal Circuit (which is semi-specialized), are generalists. We hear very few cases involving reinsurance, and cannot possibly achieve expertise in reinsurance practices except by the happenstance of having practiced in that area before becoming a judge, as none of us has. Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English, as we hope this opinion has demonstrated. The able lawyers who briefed and argued this case could have saved us some work and presented their positions more effectively had they done the translations from reinsurancese into everyday English themselves.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA LUMBERMEN'S	)
MUTUAL INSURANCE COMPANY,	)
Plaintiff/	)
Counterclaim Defendant	)
v.	)
	)
REINSURANCE RESULTS, INC.	)
Defendant/	)
Counterclaimant.	)

Cause No. 1:05-cv-0683-LJM-WTL

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant's, Reinsurance Results, Inc. ("RRI"), Motion for Summary Judgment, and Plaintiff's, Indiana Lumbermen's Mutual Insurance Company ("ILM"), Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1.

For the reasons explained herein, ILM's motion is **GRANTED**, and RRI's motion is **DENIED.**

I. BACKGROUND

ILM is a mutual insurance company organized under the laws of the State of Indiana. Pl.'s Br. at 3. ILM's principal office is in Indianapolis, Indiana. *Id.* ILM transfers a portion of its risk to other insurance companies through the use of reinsurance contracts, also called reinsurance treaties. Def. 's Br. at 2. Reinsurance is a relationship by which an insurer

secures a third party (known as a reinsurer) to insure it against loss by reason of the original insurance policy. McCormack Aff., ¶ 2. Reinsurance treaties are complex and reinsurance processing en-ors impose costs on insurance companies every year. Def.'s Exh. GG.

RRI is a Minnesota corporation with its principal place of business in Eden Prairie, Minnesota. Pl.'s Br. at 3. RRI "specializes in the identification and recovery of unapplied reinsurance loss." Def.'s Exh. GG. RRI, and others in RRI's industry, contract with insurers to review their claims and determine whether the claims were processed in accordance with the reinsurance treaties' terms and conditions. *Id.*

In September 2004, RRI solicited ILM so that RRI might audit ILM' s historical records. Pl.'s Br. at 7. Under RRI's proposal, RRI would provide "the same type of review" that it had previously performed for ILM.[1] *Id.* RRI stated it was confident that it could identify "any unapplied reinsurance" owned by ILM. *Id.* at 7. In November 2004, RRI and ILM agreed to RRI's proposal and RRI began its reinsurance review. *Id.* RRI's chairman, Thomas Thompson ("Thompson"), drafted the one-page, three paragraph agreement and the parties signed the agreement on or about November 29, 2004.[2] *Id.*

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[1] In 1999, RRI and ILM had previously contracted for a reinsurance review. Other than the use of the 1999 contract to demonstrate the parties' prior course of dealing or trade usage with respect to the present contract, there is no dispute among the parties relating to the 1999 contract or any services performed thereunder.

[2] The parties' agreement is dated November 29, 2004, by David Walters, Corporate Secretary for ILM. However,

The contract at issue is entitled "Service Agreement with Reinsurance Results, Inc" ("Agreement"). Compl. Exh. A. The text of the Agreement reads as follows:

> It is agreed that beginning [November 29, 2004], Reinsurance Results, Inc. (RRI) will review [ILM]'s historical reinsurance premium and claim cessions.
>
> Upon completion of the review, RRI will provide [ILM] with a report detailing any premium and/or claims identified during the course of the review that have been processed in accordance with the reinsurance contract terms and conditions.

Id. RRI' s fee for these services was set at 33% of the "Net Funds" collected from ILM's reinsurers as a result of this review. *Id.* "Net Funds" is defined as "over-ceded reinsurance premium plus under-ceded reinsurance loss less under-ceded reinsurance loss." *Id.* All fees were due within thirty days following receipt of the funds. *Id.*

On or about December 1, 2004, Thompson e-mailed Don Blackwell regarding the manner in which ILM recognized premiums in its financial statements. Pl.'s Br. at 9. Specifically, Thompson drafted a two-page memorandum stating that ILM had erroneously accumulated an "unearned ceded premium reserve in

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Thompson appears to have signed and dated the agreement first on November 29, 2004, and then again on November 30, 2004. This fact, along with Thompson's undisputed deposition testimony that he drafted this agreement persuades the Court that Thompson was the sole drafter of this agreement.

its financial statements." *Id.* The reserve's value on ILM's balance sheet was approximately $2.3 million. *Id.* ILM' s Excess of Loss reinsurance treaty utilizes a loss ratio, the denominator component being the net premiums earned. By decreasing or eliminating the surplus account, more of ILM's losses would be recoverable under its excess of loss reinsurance treaty. *Id.* ILM submitted to Thompson a spreadsheet that described the accounting change ILM made in 2000. *Id.* at 10. In response, RRI submitted a report to ILM on January 7, 2005 describing the additional losses recoverable if it would reverse its deferrals of the ceded premiums. Def.'s Br. at 3.

In January 2005, ILM requested PriceWaterhouseCoopers ("PwC") to review the 2000 accounting policy. Pl.'s Br. at 11. Thereafter, PwC determind that ILM should reverse the accounting change allowing for deferral of the ceded premium retroactive to 1999. *Id.* Following the accounting changes, ILM was able to cede additional claims to its reinsurer under its XOL contract. *Id.* Following the implication of this accounting change, ILM collected $1,781,000.00 from its reinsurer after reprocessing the claims for the years 1999-2001. *Id.*

ILM rejected RRI's request for payment under the contract. Subsequently, ILM filed the instant action. Pl.'s Compl. RRI counterclaimed for payment asserting a claim under the contract, as well as equitable theories of quantum meruit and promissory estoppel. Def 's Answ. and Countercl..

II. STANDARD

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a

whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). *See also United Ass 'n of BlackLandscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party

bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party. has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chi. Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John 0. Butler Co .*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

III. DISCUSSION

A. SUBSTANTIVE LAW

In diversity cases, the Court applies federal procedural law and state substantive law. *Erie R.R. v.*

Tompkins, 304 U.S. 64, 78 (1938). Rules governing contract interpretation are substantive. *See Bourke v. Dun & Bradstreet*, 159 F.3d 1032, 1036 (7th Cir. 1998). The parties have not disputed the application of Indiana law to this dispute. As such, Indiana substantive law governs the interpretation of the contract between the parties.

Under Indiana law, the construction of an unambiguous written contract is a question of law for the Court. *See Bicknell Minerals, Inc. v. Tilly*, 570 NE.2d 1307, 1311 (Ind. Ct. App. 1991). If a contract is ambiguous or uncertain, its meaning must be determined by extrinsic evidence and it is an issue of fact. *Id.* However, if the ambiguity arises only because of the language used in the contract and not because of extrinsic facts, the contract's construction is purely a question of law to be determined by the Court. *Id. See also First Fed. Savings Bank v. Key Markets, Inc.*, 559 N.E.2d 600, 603 (Ind. 1990).

B. PRELIMINARY ISSUES

As a preliminary matter, RRI argues that the Court should refrain from reviewing extrinsic evidence by applying the parol evidence rule.[3] Def.'s Br. at 10. ILM does not contest the finality of the parties' Agreement, but 1LM argues that the Court may consider extrinsic evidence to interpret the contract's terms of art. Pl.'s Br. at 19. In its initial

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[3] RRI cites to Indiana Code § 26-1-2-202 as authority in this case. Because the parties do not dispute that the contract governed the sale of services rather than goods, this statute is not authoritative. Rather the Court has directed its attention to Indiana common law. *See e.g., Franklin v. White*, 493 N.E.2d 161 (Ind. 1986).

brief, RRI concedes that the rule does not exclude evidence of a course of dealing, trade usage, or a course of performance. Def.'s Br. at 10.

RRI's argument for a broad exclusion to extrinsic evidence is not well taken. The use of extrinsic evidence is particularly appropriate so that the Court may apply the terms according to their proper meaning within the reinsurance industry. The Seventh Circuit recognizes reinsurance as "highly technical, complex business." *Reins. Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.),* 902 F.2d 1275, 1278 (7th Cir. 1990). Trade usage is particularly helpful to the Court in interpreting a contract. *See United States v. Orr Const. Co.*, 560 F.2d 765, 769-70 (7th Cir. 1977). *See also Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1059 (Ind. 2001) ("Evidence of industry practice is admissible to construe terms of art or ambiguous agreements.").

Further, RRI' s reply brief misstates Seventh Circuit precedent regarding extrinsic evidence. Def.'s Reply Br. at 7 (citing *Bank v. Truck Ins. Exch.*, 51 F.3d 736, 737 (7th Cir. 1995)). In *Bank*, Judge Posner writes that evidence on trade usage, which is described as objective testimony, *"can* be used to help interpret a written contract even if the contract seems unambiguous." *Id.* (emphasis added). For these reasons, the Court concludes that the parol evidence rule does not prohibit the evaluation of trade usage evidence.

RRI also argues that the Court should not consider the testimony of James McCormack ("McCormack"), ILM' s trade usage witness, because the evidence is not presented by disinterested third parties. Def.'s Reply Br. at 8. However, RRI has not

identified any authority for this position. *See id.* (citing *Bank,* 51 F.3d at 737; *Bristow v. Drake St. Inc.,* 41. F.3d 345, 352 (7th Cir. 1994)). *Bank* and *Bristow* discuss the verifiable nature of trade usage evidence and do not support the proposition that a competitor is unable to testify on behalf of its opponent. *Bank,* 51 F.3d at 737 (describing trade usage evidence as "capable of being given by disinterested witnesses"); *Bristow,* 41 F.3d at 352 ("evidence of trade usage is objectively verifiable."). RRI has made no specific allegation of bias against McCormack other than the fact he is a former competitor. The Seventh Circuit presumes the disinterest of a non-party witness. *Bank,* 51 F.3d at 740. Further, a court cannot universally disallow evidence by competitors; this exception would swallow the trade usage rule. Therefore, the Court declines RRI's invitation to exclude the testimony of McCormack regarding trade usage.

C. CONTRACT INTERPRETATION

The parties' arguments on contract interpretation address a variety of language in the Agreement. In particular, RRI focuses on the words "process" and "review" as supporting judgment in its favor. Def.'s Br. at 18-19. ILM discusses the phrases "review [ILM's] historical reinsurance premium and claim cessions" and "report detailing any premium and/or claims identified during the review that have not been processed in accordance with the contract terms and conditions." Pl.'s Br. at 21-24. Further, ILM notes that RRI's compensation was limited in scope to the amount collected "as a result of this review." Pl.'s Reply Br. at 10-14.

Significantly, both parties argue that the

contract is unambiguous. Upon review of the Agreement, and the evidence of trade usage, the Court agrees.[4] In particular, the Agreement demonstrates the parties' intent for RRI to review ILM's "historical reinsurance premium and claim cessions." The word "historical" implies a past activity rather than a prospective activity. By its plain and ordinary meaning, the word historical does not reflect changes made to a party's accounting method.

ILM's trade usage witness, James McCormack, testified that the reinsurance industry understands the phrase "historical reinsurance premium and claim cessions" to mean the past transfers of premium and claims to its reinsurers. McCormick Aff., ¶ 23. He states that a "review does not consider the soundness of an insurer's statutory reporting positions when compared with statutory accounting principles." *Id.* Further, he noted that the "initial step for conducting such a review is to analyze the reinsurance contract terms and conditions." *Id.* He also noted that reinsurance professionals "are focused on discovering and correcting reinsurance transactions that were not processed in accordance with reinsurance contract terms and conditions." *Id.*

This evidence is supported by the language in the contract that requires RRI to issue a report of "any premium and/or claims identified during the course of the review that have not been processed in accordance with the reinsurance contract terms and

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[4] Because the Court finds that the contract is unambiguous, the Court does not render an opinion based upon a finding of ambiguity, nor has the Court considered the evidence submitted with these motions that would be admissible only after a finding of ambiguity.

conditions." Compl. Exh. A. RRI has not directed the Court to any of ILM' s reinsurance contract terms or conditions that might require them to utilize a particular accounting method for the deferral of premiums. Further, ILM asserted that the contract does not specify a particular method for calculating its premiums. Pl.'s Reply Br. at 12-13. While RRI disputed the actual method of premium deferral, RRI submits no evidence that the parties contemplated RRI' s review of accounting methods relating to the recognition of premiums. ILM reports its premiums on its statutory form, Schedule P, using a number of accounting assumptions; any change to the underlying assumptions could change the amount allowable under ILM's excess of loss treaty. McCormack Aff., ¶36. Yet the Agreement's scope is limited to a review of ILM's historical premiums and claim cessions in light of the terms and conditions of ILM's reinsurance treaties..

RRI's attempts to correlate the words "process" and "review" are not persuasive. Def.'s Br. at 18-20. RRI argues that "the definition of accounting soundly fits within the broader definition of process. *Id.* at 18. First, the parties' Agreement uses more specific language than just the words process and review. It specifies that RRI will "review *ILM's historical reinsurance premium and claim cessions."* Compl. Exh. A (emphasis added). Further, the report from this review was to identify any premiums or claims that "have not been *processed in accordance with the reinsurance contract terms and conditions." Id.* RRI's simplistic arguments are contradicted by the express language of the contract. As discussed above, RRI fails to address ILM's arguments as to the meaning of these phrases with any evidence.

For these reasons, the Court finds that the unambiguous terms of the Agreement do not contemplate RRI's review of ILM's accounting methods, specifically ILM's deferral of reinsurance premiums. Further, RRI has not set forth any evidence regarding how review of the accounting method was specified within the contract terms and conditions. Finally, the agreement conditioned payment on funds collected "as [a] result [sic] of this review." Having considered all of the evidence and having found no genuine issue as to a material fact, the Court **GRANTS** Plaintiff ILM's Motion for Summary Judgment, and **DENIES** Defendant/Counterclaimant RRI's Motion for Summary Judgment.

D. RRI'S EQUITABLE CLAIMS

ILM' s brief on its face attacks "all forms of requested relief' brought by RRI. Pl.'s Br. at 34. However, RRI has asserted additional claims for quantum meruit and promissory estoppel. Def.'s Answ. and Countercl.. Both ILM and RRI did not specifically address these counts in their briefs. Other Southern District of Indiana diversity cases, applying Indiana law, have held that equitable claims such as promissory estoppel and unjust enrichment (quantum meruit) are unavailable where the promises cited by the claimant are founded in a valid written contract. *Decatur Ventures, LLC v. Stapleton Ventures, Inc.*, 373 F.Supp.2d 829, 848-49 (S.D. Ind. 2005) ("[I]f the promises cited by [claimants] are founded on a valid written contract between the parties, then the promissory estoppel claim becomes unwarranted surplusage.") (citing *Meisenhelder v. Zipp. Exp., Inc.*, 788 N.E.2d 924, 932 (Ind. Ct. App. 2003); *All-Tech*

Telecom, Inc. v. Amway, Corp., 174 F.3d 862, 868-69 (7th Cir. 1999)); *Id.* ("[T]he same problem posed by [claimants'] promissory estoppel claim also emerges with respect to their unjust enrichment claim: the existence of a contract. [Claimants'] unjust enrichment claim becomes superfluous when neither side disputes the existence of a valid contract, even if it is being alleged in the alternative.") (citing *Key Hotel Corp., Club Olympia, Inc. v. Crowe, Chizek & Co.*, 359 N.E.2d 262, 265 (Ind. Ct. App. 1977)). The Court is inclined to dismiss RRI's claims for promissory estoppel and quantum meruit. However, the parties have not briefed these issues. Therefore, the Court now **ORDERS** Defendant/Counterclaimant RRI to **SHOW CAUSE** within 15 days why its claims for promissory estoppel and quantum meruit should not be dismissed. ILM has 7 days to reply, if necessary.

IV. CONCLUSION

For the above reasons, the Court **GRANTS** Plaintiff ILM' s Motion for Summary Judgment. The Court further **DENIES** Defendant RRI's Motion for Summary Judgment. Defendant RRI is ordered to **SHOW CAUSE** within 15 days why its claims for promissory estoppel and quantum meruit should not be dismissed.

IT IS SO ORDERED this 27th day of October, 2006.

s/_____
LARRY J. MCKINNEY,
CHIEF JUDGE
United States District Court
Southern District of Indiana

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No. 08-87

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IN THE

Supreme Court of the United States

REINSURANCE RESULTS, INC.,

Petitioner,

v.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether judicial factfinding in furtherance of construing an unambiguous contract under state law is an action that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Indiana Lumbermens Mutual Insurance Company respectfully states that it has no parent corporation, and that no publicly held corporation owns ten (10%) percent or more of its stock.

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STATEMENT OF THE CASE

Indiana Lumbermens Mutual Insurance Company ("ILM") is an insurer who transfers a portion of its risk to reinsurers by paying premium in exchange for reinsurance. (Pet. App. at A-14.) In 2000, ILM made a decision, with the approval of its auditor, to change its accounting policy regarding the premium cost of its reinsurance policies. Rather than treat the full premium cost as an expense in the calendar year in which ILM paid the premium (as ILM had done in the past), ILM elected to expense a proportionate amount of its premium cost in each month in which its reinsurance policy was in effect (i.e., to defer recognition of reinsurance premium expense over the term of the underlying policy risk), and to reflect the balance of the premium expense not as an expense, but as a prepaid asset. (*Id.* at A-2 – 3.) This change (the "2000 Accounting Policy Change") created a prepaid asset account on ILM's balance sheet, but also reduced the amount ILM could recover from its reinsurers under its reinsurance policies. (*Id.* at A-3 – 4.)

On November 29, 2004, ILM and Reinsurance Results, Inc. ("RRI") entered into a one-page Service Agreement (the "Agreement"). Thereunder, RRI agreed to "review [ILM's] historical reinsurance premium and claims cessions" and to "provide [ILM] with a report detailing any premium and/or claims identified during the course of the review that have been processed in accordance with the reinsurance contract terms and conditions." (*Id.* at A-16.) "RRI's fee for these services was set at 33% of the 'Net Funds' collected from ILM's reinsurers as a result of this review." (*Id.*)

On or about December 1, 2004, RRI sent ILM a memo questioning the propriety of ILM's prepaid reinsurance premium asset (created as a result of the 2000 Accounting Policy Change). (*Id.* at A-16 – 17.) ILM responded by describing its 2000 Accounting Policy Change to RRI. (*Id.* at A-17.) RRI replied by suggesting that ILM could obtain additional recoveries from its reinsurers if it reversed the 2000 Accounting Policy Change. (*Id.*)

In January 2005, ILM's auditor recommended that ILM should revert to the accounting policy that it had in place prior to the 2000 Accounting Policy Change. (*Id.*) ILM followed its auditor's recommendation and, as a result, was required to eliminate its prepaid reinsurance premium asset and was able to recover additional amounts from its reinsurers. (*Id.* at A-5.) In substance and effect, ILM simply reversed the operation of the 2000 Accounting Policy Change. The parties dispute whether the Agreement provides RRI with a right to recover 33% of those additional amounts from reinsurers.

On October 27, 2006, the United States District Court for the Southern District of Indiana granted summary judgment in favor of ILM on RRI's breach of contract claim.[1] It found that the terms of the Agreement were unambiguous (as contended by both parties) and thus applied Indiana law to construe the Agreement as a matter of law. (*Id.* at A-20, A-22 – 23.) The district

[1] RRI abandoned its promissory estoppel claim and did not seek appellate review of the district court's denial of its *quantum meruit* claim.

court found that "the Agreement's scope is limited to a review of ILM's historical premiums and claim cessions in light of the terms and conditions of ILM's reinsurance treaties"; that RRI failed to identify "any evidence regarding how review of the accounting method was specified within the contract terms and conditions"; and that the Agreement did "not contemplate RRI's review of ILM's accounting methods, specifically ILM's deferral of [the expense of] reinsurance premiums." (*Id.* at A-24 – 25.)

RRI appealed the district court's judgment to the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment on January 16, 2008. The Seventh Circuit found that, to the extent RRI conferred any benefit upon ILM, the Agreement is "specific and clear" that any such conferral was not compensable under the Agreement—that is, "it was not a benefit for which [ILM] was contractually obligated to compensate [RRI]." (*Id.* at A-7 – 8.) Indeed, RRI "rendered a service outside the contract[.]" (*Id.* at A-10.) The Seventh Circuit noted that RRI "might have drafted the [Agreement] more broadly—might have inserted a provision entitling [RRI] to be compensated for any advice it gave [ILM] that the latter took[,]" but, absent such a provision, found that RRI "really is seeking more than it bargained to receive." (*Id.* at A-12.) Following the Seventh Circuit's decision, RRI filed its Petition.

REASONS FOR DENYING THE PETITION

The two courts below correctly interpreted under Indiana law the terms and conditions of a one-page contract for the niche service of reinsurance processing review. The district court and the Seventh Circuit have each have construed the terms of that contract based on the designated evidence before them, and both have determined as a matter of law that RRI is seeking and is not entitled to recover compensation for performing services beyond the scope of the unambiguous contract it drafted. Those courts respectively granted and affirmed summary judgment in favor of ILM based on their resolutions of that question of law.

RRI does not challenge the identical legal determination of the two courts below, and has not identified a compelling reason for this Court to exercise its discretion to grant RRI's Petition. RRI contends that only one of the considerations governing review on certiorari set forth in Supreme Court Rule 10 is implicated by the decisions of the courts below: a "depart[ure] from the accepted and usual course of judicial proceedings [*see* Sup. Ct. R. 10(a)] by ignoring established case law regarding a Rule 56 motion for summary judgment." (Pet. at 8-9.) Specifically, RRI identifies four facts that it believes were both material to the grant of summary judgment and in dispute, and contends that both courts below erroneously found each of the four facts to be undisputed. (*Id.* at i, 5-8.) In fact, none of those four facts were material to the courts' decisions. RRI's Petition should be denied for this reason alone.

Even if any of the four facts RRI identifies were material, this Court would violate its own "two-court rule" were it to re-find facts for a third time. Further, if this Court took that step, it would find that none of the two lower courts' findings were clearly erroneous based on the designated evidence before them (and on RRI's failure to designate evidence bearing on the findings it challenges). Moreover, the propriety of the courts' factfinding in this contract dispute in a niche industry is not an issue of concern to the public. Ultimately, judicial factfinding is a routine occurrence and is not "a departure from the accepted and usual course of judicial proceedings." For all of the reasons herein, this Court should deny RRI's Petition.

A. None of the Four Facts Identified in RRI's Petition Are Material to the Two Lower Courts' Resolution of an Outcome Determinative Question of Law.

The only question RRI presents for this Court's review is the propriety of the two lower courts' findings of material fact. There is no compelling reason for this Court to review these challenged findings of fact because none of them were material to the lower courts' respective decisions to enter and affirm summary judgment in favor of ILM. Indeed, RRI's Petition fails to challenge an outcome determinative legal conclusion independently reached by the two courts below—that is, that RRI's activities exceeded the unambiguous scope of the Agreement it drafted such that it is not entitled to the compensation it seeks.

At its core, this dispute centers around RRI's desire to be compensated for reviewing the propriety of a statutory accounting policy knowingly adopted by ILM, with the approval of ILM's auditor. (Pet. App. at A-2 – 3.) However, the Agreement is clear that RRI did not bargain to be compensated for that activity, but only in the event ILM recovered "Net Funds" from reinsurers as a result of RRI's "review [of] [ILM's] historical reinsurance premium and claims cessions."

Both courts below construed these unambiguous contract terms as a matter of Indiana law. (*See id.* at A-7, A-20.) The district court considered the testimony of ILM's expert regarding the meaning of certain terms in the Agreement as used within the reinsurance review industry. (*Id.* at A-23.) The district court held that "the unambiguous terms of the Agreement do not contemplate RRI's review of ILM's accounting methods, specifically ILM's deferral of [the expense of] reinsurance premiums. Further, RRI has not set forth any evidence regarding how review of the accounting method was specified within the contract terms and conditions." (*Id.* at A-24 – 25.)

The Seventh Circuit held the same—that the Agreement is "specific and clear" that any benefit conferred by RRI's review of ILM's accounting policies "was not a benefit for which [ILM] was contractually obligated to compensate [RRI]." (*Id.* at A-7 – 8.) Indeed, the court held that RRI "rendered a service outside the contract[.]" (*Id.* at A-10.) It reasoned that RRI "might have drafted the [Agreement] more broadly—might have inserted a provision entitling [RRI] to be compensated for any advice it gave [ILM] that the latter

took[,]" but, absent such a provision, RRI "really is seeking more than it bargained to receive." (*Id.* at A-12.)

The foregoing demonstrates that none of the facts that RRI identified in its Petition are material to the lower courts' construction of the compensable scope of RRI's review as a matter of Indiana law. Whether RRI identified a "processing error," whether ILM benefitted from RRI's advice, or whether Statement of Statutory Accounting Principles No. 62 changed after the year 2000, are issues that have no bearing on whether RRI was entitled to be compensated for *reviewing ILM's statutory accounting policies* under an Agreement that only provided RRI with a contingent right of compensation based on its findings following a *review of ILM's "historical premium and claims cessions."* The two courts below both found that RRI's review exceeded the scope of the Agreement it drafted, and that RRI was not entitled to the compensation it seeks. RRI failed to challenge that legal determination in its Petition. As such, there is no compelling reason for this Court to re-review the propriety of findings of fact immaterial to the lower courts' decisions.

B. There Is No Compelling Reason for This Court to Review the Factfinding of Two Lower Courts.

The only question RRI presents for this Court's review is the propriety of two lower courts' findings of material fact. Even if any fact identified by RRI was material, this Court's Rules and precedent make clear that it does not convene to re-find facts in cases like the

present. This case implicates the interests of only the two captioned parties, does not feature an issue of constitutional significance, and is not so compelling to justify this Court's violation of its own "two-court rule." RRI's Petition should thus be denied.

This Court's Rules and precedent presume that the issues that RRI presents are not "compelling." Supreme Court Rule 10 provides: "A petition for a writ of certiorari is rarely granted when the asserted error consists of *erroneous factual findings* or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. (emphasis added).

Further, this Court has previously alerted litigants that it does not sit to review judicial factfinding in cases like the present—that is, those not involving a constitutional claim that may depend on the resolution of purported issues of material fact. In *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630 (1967), the petitioner requested this Court to reject as "clearly erroneous" a factual conclusion reached by the district court and accepted by the court of appeals. This Court refused to consider the matter for a principled reason: "In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Id.* at 635 (citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below

in the absence of a very obvious and exceptional showing of error.")). "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." *Id.* at 636.

In this case, RRI asks this Court to violate its own "two-court rule." Both the district court and the Seventh Circuit below reviewed the record before them, found material facts, and determined that RRI was not entitled to recover under the Agreement. Assuming *arguendo* that the four findings identified by RRI were material to those determinations, none of the findings were clearly, obviously and exceptionally erroneous.

First, RRI disputes the two lower courts' findings that RRI failed to identify a "processing error" when it reviewed ILM's statutory accounting policies and recognized the 2000 Accounting Policy Change knowingly adopted by ILM. RRI's burden was to submit evidence that it identified an instance in which ILM failed to process premium or claims "in accordance with the reinsurance contract terms and conditions" during its review of ILM's "historical reinsurance premium and claims cessions." (*See* Pet. at 6-7 ("Processing of Claims").) The courts below uniformly found that RRI failed to meet its burden.

The two lower courts reviewed the terms and conditions of the reinsurance contract at issue (the Aggregate Excess of Loss treaty) and each determined that ILM correctly "processed" "historical reinsurance premium and claims cessions" in accordance therewith. The district court found that "RRI [did] not direct[] the

Court to any of ILM's reinsurance contract terms or conditions that might require them to utilize a particular accounting method for the deferral of premiums." (Pet. App. at A-24.) It further rejected RRI's "simplistic" argument that "the definition of accounting soundly fits within the broader definition of process" as "contradicted by the express language of the contract." (*Id.*) Ultimately, it found that RRI failed to address ILM's arguments regarding the industry meaning of the phrases used in the Agreement with any evidence. (*Id.*) The district court's finding that RRI failed to identify an instance in which ILM failed to properly process premium or claims "in accordance with the reinsurance contract terms and conditions" could not have been clearly erroneous when RRI failed to meet the evidentiary burden imposed on it by Federal Rule of Civil Procedure Rule 56(e).[2]

For its part, the Seventh Circuit found in no uncertain terms that "[t]he claims that the insurance company submitted to its reinsurers were correctly

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[2] Federal Rule of Civil Procedure Rule 56(e) provides,

> "When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, *its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.*"

Fed. R. Civ. P. 56(e) (emphasis added).

processed. Nothing in the terms of its reinsurance contracts requires it to use one method of accounting rather than another." (Pet. App. at A-7.) The decision to choose one accounting policy over another "was a decision internal to the insurance company; it had nothing to do with the terms of the reinsurance contracts." (*Id.* at A-8.) ILM's decision was not a failure to process premium or claims "in accordance with reinsurance contract terms and conditions." (*See id.*)

Second, RRI erroneously contends that the Seventh Circuit *concluded* that ILM did not benefit from RRI's review of ILM's statutory accounting policies and recognition of the 2000 Accounting Policy Change knowingly adopted by ILM. (Pet. at 7 ("'No Benefit' to ILM").) The Seventh Circuit reached no such conclusion. Rather, it found that "[RRI's] discovery of the 2000 accounting maneuver and its recommendation that [ILM] abandon it *may* have benefited [ILM]. But it was not a benefit for which [ILM] was contractually obligated to compensate [RRI]." (Pet. App. at A-8 (emphasis in original).) Thus, the Seventh Circuit made no finding on the issue and, even if it did, that finding was clearly not material to its decision to affirm the district court's entry of summary judgment against RRI.

Third, RRI contends that Statement of Statutory Accounting Principles No. 62 ("SSAP 62") did not change subsequent to the 2000 Accounting Policy Change. (Pet. at 7-8 ("Accounting Standard 62").) Whether it did or did not was not material to the decisions of two

courts below. (ILM designated evidence that it did.[3]) The district court never referenced SSAP 62 in its opinion. The Seventh Circuit notes that ILM's auditor advised ILM to revert to its pre-2000 accounting policy because of a change to SSAP 62. (Pet. App. at A-5.) However, neither the fact that ILM followed its auditor's advice nor the reason therefor (be it a change in SSAP 62 or otherwise) has any relevance to the primary grounds for the courts' decisions—that RRI did not bargain to be compensated to review ILM's statutory accounting policies and, in any event, failed to identify any instance in which ILM failed to properly process premium or claims "in accordance with the reinsurance contract terms and conditions."

Fourth, RRI again contends that it found a processing error. (Pet. at 8 ("Accounting Change").) As discussed *supra*, the two lower courts' findings to the contrary were correct and not clearly erroneous.

In short, RRI has not identified any "very obvious and exceptional showing of error" as would be required for this Court to violate its "two-court rule." *See Graver Tank*, 336 U.S. at 275. There is no compelling reason for this Court to find facts for the third time in this case. Indeed, even if the two courts below *both* clearly erred in their findings of material fact (which they did not), this Court's discretionary review "depends on numerous

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[3] ILM proffered testimony that its auditor "determined that it was proper for ILM to revert to the statutory accounting policy ILM originally had in place for FY 1999 (prior to the change in 2000) due to a change to a statutory accounting rule (Statement of Statutory Accounting Procedures 62) in a year subsequent to 2000." (Supplemental Appendix 041 ¶ 24.)

factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

As previously noted, RRI has not identified any embarrassing conflict of opinion between circuit courts of appeals. RRI has conceded that its only contention is that the lower courts' factfinding "departed from the usual and accepted course of judicial proceedings." As explained *supra*, it is only a rare instance when this Court would agree to sit to re-review the factfinding of two lower courts (e.g., when the facts at issue implicate a potential constitutional deprivation). And that instance is not present in this case.

Moreover, only the parties to this dispute have an interest in its outcome—RRI's in being compensated for performing activities outside the scope of the Agreement and ILM's in proving that it had no obligation to compensate RRI for such activities. Whether RRI is adjudged to be seeking to receive more than it bargained to receive under the Agreement (*see* App. at A-12) is of no concern to the greater public.

In summary, none of the factors this Court considers when evaluating whether to grant a petition for a writ of certiorari is present in this case. Under this Court's Rules and precedent, an alleged error in factfinding by two lower courts is not a compelling reason for granting a petition for a writ of certiorari. Sup. Ct. R. 10; *Berenyi*, 385 U.S. at 635. Thus, RRI's Petition should be denied.

CONCLUSION

RRI has not identified any compelling reason for this Court to exercise its discretion to grant RRI's Petition for a Writ of Certiorari. ILM respectfully requests this Court to deny RRI's Petition, and to further award all other just and proper relief.

Respectfully submitted,

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